No. 20941

United States
COURT OF APPEALS
for the Ninth Circuit

ILMAR KOIVUNEN,

Plaintiff-Appellant,

v.

STATES LINE,

Defendant-Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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REPLY IN SUPPORT OF SPECIFICATION OF ERROR

There was no evidence, direct or circumstantial, that plaintiff failed to maintain a proper lookout, or that he loosened the bracing that fell upon him. On the contrary, all of the evidence, including that produced by the defendant, indicated that the sole cause of the collapse of the bracing was the lack of proper "rabbeting" or bracing at the ends of the "toms" which supported the bracing.

ARGUMENT

Far from asserting that the shoring which fell upon plaintiff fell "spontaneously" (Br. 2), plaintiff contends that the sole cause of its fall was the lack of proper bracing as described in the Statement of Facts in plaintiff's opening brief, pages six and seven.

There is no argument that circumstantial evidence, or what is called in Oregon "direct evidence" (ORS 41.080) may be used to prove facts. However, indirect evidence, in order to be probative, must afford an inference of the fact in dispute. Such an inference is based upon the unstated assumption that given the indirect facts, things ordinarily happen in the course of events which prove the fact in dispute.

A careful reading of the case at bar shows that there was no evidence, either direct or circumstantial, which would tend to show negligence on the part of the plaintiff.

Defendant argues that the shoring would not have fallen without human intervention. This is simply not supported by the evidence.

Defendant's witness John Briggs, a walking boss for Jones Stevedoring, testified that although the Georgia-Pacific Dock is located in Coos Bay, you can have some "pretty fair chops" if there is bad weather and wind blowing (Tr. 160, 165).

This evidence, coupled with the testimony of Captain Devanney, that the movement of the ship tied to the dock where there are swells, would cause a pulling

out of the nails at the base of the "toms" (Tr. 67-69), and the additional fact that the accident happened during the winter on December 27, 1963, clearly indicates forces at work which could cause the shoring to collapse.

The defendant stresses that the *S. S. Ohio* crossed the Columbia River Bar in strong winds and winter seas when there would have been considerable pitching, and that the shoring survived this stress. This fact proves only that the shoring was probably weakened during this passage from the Columbia River to Coos Bay.

Defendant stresses that none of the bales of pulp fell. Of course, the shoring could have exerted enough force in and of itself, against the bracings, because the testimony was clear that the shoring itself was very heavy, weighing six or seven hundred pounds (Tr. 8).

Defendant argues that the fact that plaintiff was bending over to pick up a peavey when the shoring collapsed on him indicates that the peavey had been used to loosen the braces which held the shoring in place. Such an inference is not justified in view of the well-known fact that when longshoremen enter a hold to move cargo, various instruments, devices and tools are placed about the hold, and particularly in the restricted area in the square under the hatch which is not occupied by cargo.

Under all of these circumstances, there is absolutely no basis for the statement on page six of defendant's brief that it appears "virtually certain that plaintiff

loosened the bracings himself or knew that his son had done so."

It should be also pointed out that in its brief, defendant has failed to discuss a single one of the cases cited by plaintiff. As can be seen, these cases are very much in point and have a close factual correspondence with the case at bar. Defendant's failure to deal with these cases is an index of the weakness of its legal position.

CONCLUSION

There being no evidence, either direct or circumstantial, of negligence on the part of the plaintiff in the specifications charged in the defendant's answer, it was an error for the trial court to have submitted the issue of contributory negligence to the jury. It is obvious from the extent of injuries suffered by the plaintiff, that this had a devastating effect on the size of the verdict. In this way, plaintiff was prejudiced by the error of the trial court, and the judgment should be reversed and the case remanded for a new trial on the issue of damages only.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GERALD H. ROBINSON
Of Attorneys for Appellant